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IN THE

Supreme Court Of The United States

October Term, 1990

ED PETER MACK and NATHANIEL GOSHA, III,
individually and on behalf of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION and
ETOWAH COUNTY COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

- 1. In an action to enjoin enforcement of a State law which has not been submitted for preclearance under Section 5 of the Voting Rights Act, may the local three-judge district court, exercising its limited jurisdiction, refuse to enjoin the State law on the ground that, even though intervening changes reveal a clear potential for discrimination today, it would have had no potential for discrimination under the conditions existing when the unprecleared law was enacted?**
- 2. Must a county government or State submit for preclearance, under Section 5 of the Voting Rights Act, a State law which transfers powers from an elected county official to an appointed county official?**

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PARTIES IN COURT BELOW

The parties in the court below at the time of the judgment were plaintiffs Ed Peter Mack, Nathaniel Gosha, III, Lawrence C. Presley, and defendants Russell County Commission and Etowah County Commission. This appeal relates only to the claim of Mack and Gosha against the Russell County Commission. Lawrence C. Presley, a resident of Etowah County, has informed the Clerk that he has no interest in this appeal.

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OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the District Court is reproduced beginning at A-1; the order denying the motion to alter or amend the judgment is reproduced beginning at A-42.

JURISDICTION

The District Court denied the requested injunction on 1 August 1990 and denied the motion to alter or amend the judgment on 21 August 1990. This appeal is taken under 28 USC §1253.

STATUTORY PROVISIONS

Alabama Act 79-652 is reproduced beginning at A-48. Section 5 of the Voting Rights Act of 1965 (42 USC § 1973c) is reproduced beginning at A-45.

STATEMENT OF THE CASE

Alabama Act 79-652 transferred from the Russell County Commissioners to the Russell County Engineer all functions, duties, and responsibilities for roads, highways, bridges, and ferries — this centralized control is called "the unit system" in Alabama. Prior to that, each commissioner had controlled the road work in his own district.

Despite its transfer of important governmental functions from the supervision and control of elected county commissioners to the (appointed) county engineer, neither the County Commission nor any State official made any attempt to submit Act 79-652 for preclearance until the Department of Justice made a written request in 1989 that it be submitted. When the County refused to do so, the plaintiffs brought this action.

At the time the 1979 act was adopted, the Russell County Commission consisted of five commissioners elected at large from four residency subdistricts; three rural districts had one commissioner each and Phenix City (the largest city in the county) had two seats on the commission. The commissioners residing in the rural

districts exercised exclusive discretion and control over the road shops, road equipment, materials, expenditures and employees in their respective districts. Each commissioner was responsible for maintaining a county workshop and for maintaining a road crew. Prior to converting to the unit system, each "commissioner had a road crew that he was in charge of and that he — even though he had a foreman, you know, he made the assignments and pretty generally called the shots on what work was done and where and so forth."¹ Each commissioner also made decisions about hiring, firing, and assignment of personnel in his road shop. This amounted to substantial employment authority, because the road and bridge system is a major employer in Russell County government. Road and bridge expenditures represent the vast majority of the county's budget and of public monies over which the county government exercises discretionary authority. The budget of the county engineer is \$1.8 million. Prior to implementation of Act 79-652, appropriations from the budget were made on the basis of road and bridge districts.

In May 1979, the Russell County Commission adopted a resolution which placed all county road construction, maintenance, personnel and inventory under the supervision of the County Engineer and requested the Russell County legislative delegation to enact this change as law. In July 1979 the Alabama State Legislature passed Act 79-652, which converted the process for governing the road and bridge budget and operations to a "unit system." The Act provides:

All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

¹Adams depo. at 11. Former Representative Charles Adams was the primary sponsor of Act 79-652.

The conversion to a unit system was a fundamental alteration in the governing process of the county commission's road and bridge system. The change was so far-reaching that the unit system has been implemented gradually over a period of time — despite the mandate of Act 79-652. Conversion to the unit system also required restructuring some of the road shops.

The Russell County Commission is now composed of seven commissioners elected from single-member districts, pursuant to an order entered 17 March 1985, in *Sumbry v Russell County*, CA No. 84-T-1386-E (MD Ala). That order approved a consent decree providing for elections from single-member districts beginning in 1986 and was designed to remedy unlawful dilution of black voting strength caused by the prior at-large election system. Nathaniel Gosha, III, and Ed Peter Mack, the first black county commissioners in Russell County, were elected in 1986 from Districts 4 and 5, respectively, each of which has a black voter majority.

Commissioners Mack and Gosha (appellants in this Court) petitioned the District Court for a injunction to restrain appellee Russell County Commission from implementing Act 79-652, until and unless the statute receives preclearance under Section 5 of the Voting Rights Act, 42 USC § 1973c.² The District Court ruled that Act 79-652 did not have to be submitted for preclearance. The appellants filed a timely appeal.

² Mack, Gosha, William America (Escambia County commissioner) and Lawrence Presley (Etowah County commissioner) first brought suit under Section 2 of the Voting Rights Act and Title VI of the Civil Rights Act of 1964 about similar discriminatory practices that reduced the effectiveness of the commissioners elected by blacks in each of the counties. Mack and Gosha claimed that the county unit plan was being administered in a discriminatory way. Later, when they discovered that the county unit plan had not been submitted for preclearance, they amended their complaint to ask for relief under Section 5. Their other claims are still pending in the District Court. This appeal relates only to the Section 5 claim of Mack and Gosha against Russell County.

THE QUESTIONS ARE SUBSTANTIAL

Just as the voting power of the black electorate is submerged when at-large elections are used where there is racially polarized voting, the change from a district road system to a unit system may dilute the power of officials elected by blacks. In an at-large election, blacks may be unable to elect representatives of their choice; if the county adopts single-member districts for elections and a unit system for road work, black voters may be unable to have their elected representatives carry out the policies desired by the black electorate. This case raises the important question whether the change to a unit system must be submitted for preclearance under Section 5 of the Voting Rights Act.

Section 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, requires a State or political subdivision covered by the Act to withhold implementation of any change in its standards, practices, or procedures with respect to voting until it obtains from the Attorney General of the United States or the District Court for the District of Columbia a determination that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race. "The legislative history [of Section 5] on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v State Board of Elections*, 393 US 533, 566 (1969).

I. The District Court decision is in conflict with decisions of this Court and the regulations of the Department of Justice regarding the proper "benchmark" for comparison of an unprecleared change in election-related law.

The District Court correctly stated the statutory rule

that in assessing the discriminatory or retrogressive effect of a change, the proper benchmark for comparison is the regime 'in effect at the time of the submission,' taking into account duly precleared changes which have occurred subsequent to the original statutory benchmark date.

...

We therefore measure the purported changes in this case against the benchmark of the 1964 regime as modified by any intervening duly precleared changes.

Order, A-14-15.

The standard stated by the District Court was the one used by this Court in *City of Rome v United States*, 446 US 156 (1980). Over a 10-year period Rome had failed to submit 60 annexations for preclearance. Upon submission, the Attorney General objected to 13 of the annexations. This Court held,

Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data.

446 US at 186. The district court in *Rome* had used the current perspective because Section 5 "requires, in the future tense, that the plaintiff jurisdiction demonstrate that its voting changes '*will not*' have a discriminatory effect," *City of Rome v United States*, 472 FSupp 221, 246 (D DC 1979) (3-judge court) (emphasis in original).⁹ The Department of Justice regulations governing Section 5 submissions have codified this standard. 28 CFR § 51.54(b) provides, in part, as follows:

- (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure *in effect at the time of the submission*. If the existing practice or procedure was not in effect on the jurisdiction's applicable date for coverage . . . and is not otherwise legally enforceable under Section 5, it cannot

⁹This same prospective application has been applied in favor of a jurisdiction, as well. In *City of Richmond v United States*, 422 US 358, 373-375 (1975), this Court held that even if annexations were originally undertaken with an impermissible purpose, they could be approved under Section 5 if, at the time the annexations were being reviewed, there were sound non-discriminatory grounds to support them.

serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the *conditions existing at the time of the submission.* (Emphasis supplied.)

Despite its citation of the correct standard, the District Court failed to follow the standard.

In 1964 the Russell County Commission had three members elected at large from residency districts; within each residency district the commissioner controlled road work. Order, A-2. In 1985 the commission was enlarged to seven members, elected from single-member districts; this change was precleared. Order, A-4. Thus, "the 1964 regime as modified by any intervening duly precleared changes" was seven single-member districts and each commissioner having control over road construction and maintenance in his district.

Rather than judging whether the change to a county unit system affects voting in the context of the 1985 precleared change to single-member districts, the District Court incorrectly judged the county unit system as if it affected only an at-large system. The District Court was deciding whether it would have required the county unit system to be submitted for preclearance in 1979 without regard for the events that have occurred since then. The District Court committed clear error by centering its attention only on the conditions immediately "before and after the 1979 change," A-21, when the county commission was still elected at large.

Since "the question [in a Section 5 injunction action] is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination," *Dougherty County Board of Education v White*, 439 US 32, 42 (1978) (emphasis in original), the court must look at all evidence which might demonstrate a potential for discrimination. The law is "a fool and a ass" (to quote Mr. Macabre) if the court must blind itself to actual discrimination by pretending that it would not have seen the *potential* for that discrimination several years earlier.

II. The decision of the District Court is in conflict with this Court's holdings in *Allen v State Board of Elections*, 393 US 533 (1969), *McCain v Lybrand*, 465 US 236 (1984) and *Dougherty County Board of Education v White*, 439 US 32 (1978), which require that a State must preclear a transfer of responsibilities from elected to appointed officials.

A.

A unit system has the potential to dilute black voting strength. A switch from a district road system to a unit system changes the manner of sharing political power on the commission from one in which each member controlled a portion of the budget, which he or she could use to bargain with other commissioners for constituent services of all sorts, to a system that gave the white majority effective control over every decision concerning the road and bridge system.

As the dissent noted in *Rutan v Republican Party of Illinois*, ___ US ___, 111 LEd2d 52, 88 (1990),

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. . . . The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

While this case is not about patronage, it is about a similar form of political power: the ability of commissioners to act with relative autonomy within their own districts so that they may provide services useful to their black constituents, but which may not be provided by a white-majority commission to black constituents. In the context of racially polarized voting (which was the basis of the *Sumbry* complaint), a change from the tradition of commissioner-to-commissioner "horse-trading" to majority-vote decision-making could operate to the unique disadvantage of the newly empowered black community.

B.

One of the three cases decided with *Allen* was *Bunton v Patterson*, in which the plaintiffs alleged that the State of Missis-

sippi had first to obtain approval under Section 5 of the Voting Rights Act before it could enforce a law requiring 11 counties to appoint, instead of elect, the county superintendent of education. *Allen*, 393 US at 550-551. This Court held, "an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters." *Allen*, 393 US at 569-570.

If the State of Alabama had changed the office of Russell County commissioner from elective to appointive, it would have had to obtain preclearance. A substantial question exists whether the State must obtain preclearance if it shifts powers to an appointive officer while continuing to elect the officer from whom the powers were taken — that is, when it uses indirect means to accomplish the goal of removing voter control over the official exercising significant powers. In the present case, the voters continue to elect county commissioners, but a significant power formerly held by those commissioners has been shifted to the county engineer, over whom the voters have no direct control. The net result of the Russell County change is the same as in *Bunton* — less power for the voters over their local affairs.

In *McCain v Lybrand*, 465 US 236 (1984), this Court considered whether a change in county government from two appointed and one elected member to three elected members had to be submitted under Section 5 and held,

While this matter may be more fully explored in future proceedings after remand, several changes [covered by Section 5] are suggested: . . . the basic reallocation of authority from the state legislative delegation to the Council, [and] the shift from two appointed Board positions to at-large election of their Council counterparts. . . .

McCain, 465 US at 250 n.17. Surely, if a change from appointment to election must be precleared, a transfer of power from an elected to an appointed official must similarly be submitted for preclearance.

C.

The elimination of political powers previously exercised by elected commissioners might also have the potential of inhibiting black citizens from seeking or remaining in office. This Court, in *Dougherty County Board of Education v White*, 439 US 32 (1978), required preclearance of a board of education's rule requiring all employees seeking elective office to take a leave of absence without pay. Noting that the phrase "standard, practice, or procedure" found in Section 5 of the Voting Rights Act must be given the "broadest possible scope," the Court found that preclearance was required of "[a]ny alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections *or to become or remain office-holders.*" *Dougherty*, 439 US at 39 (emphasis in original).

The Russell County legislation cannot be characterized as having only a minimal effect on the duties and responsibilities of the new black county commissioners. To the contrary, the road and bridge revenues constitute the vast majority of the public monies over which the commissioners exercise discretionary authority. The record is replete with statements attesting to the political influence that accompanies control over the road and bridge operations and budget. Without the power to influence the road and bridge budget, representatives of black voters are less able to respond to requests by constituents and to protect their interests.

III. The decision of the District Court in this case is in conflict with decisions of other three-judge district courts holding that a State must preclear a transfer of responsibilities from elected to appointed officials.

Preclearance has been required in a number of cases involving the transfer of governmental authority from officials elected by one constituency to officials elected by a different constituency or to appointed officials. In *Horry County v United States*, 449 FSupp 990 (D DC 1978), the court found that a South Carolina statute constituted a change in electoral practices requiring preclearance because it provided for electing public officials who formerly were appointed by the Governor.

An alternate reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements. Cf. *Perkins v Matthews*, [400 US 382 (1971)]; *Allen v State Board of Elections*, *supra*.

449 FSupp at 995. See also, *County Council of Sumter County v United States*, 555 FSupp 694 (D DC 1983) (preclearance required of a law which eliminated the legal power of the governor and general assembly over local affairs and vested it exclusively in a county council elected at large by county voters).

Addressing a change which resembles that effected by Act 79-652, the *Horry County* court also held that the statute required preclearance because it changed the duties of the chairman of the county council. *Horry County* at 995. The chairman previously had authority to direct the construction and repair of all roads and bridges in the county and supervise the employees engaged in such work, subject to the approval of a majority of the Board. The new statute assigned the chairman no powers or authority different from those of the other council members. *Horry County* at 993-94. The new statute also gave the county council additional taxing, legislative and administrative duties which were not provided under the previous statute. *Horry County* at 994.

The duties of the chairman of the former Horry County Board of Commissioners and those of the chairman of the Horry County Council under Act R546 are sufficiently different that in this respect also Act R546 constitutes a change in electoral practices requiring preclearance under Section 5 of the Voting Rights Act — unlike the two at large council seats in *Bear v United States*, . . . 425 US [130] at 139 [(1976)], which underwent no change at all.

Horry County at 995-96.

In *Hardy v Wallace*, 603 FSupp 174 (ND Ala 1985), a three-judge court required preclearance of a statute that transferred

the power to appoint members of the Greene County Racing Commission from the Greene County legislative delegation to the State governor. Writing for the court, the late Judge Robert S. Vance noted that "the most relevant attribute of the challenged act is its effect on the power of the voters rather than any aspect of the electoral process." *Hardy* at 178. Similarly, the power of the voters in black-majority districts to choose a commissioner who will follow their wishes and have the power to do so is a relevant attribute of the pre-1979 situation in Russell County.

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